

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

**TONY EPPS,**

**and**

**MATTHEW SULLIVAN,  
For themselves and on behalf  
of all others similarly situated,**

**Plaintiffs,**

**v.**

**Case No.: 2:17cv562**

**SCAFFOLDING SOLUTIONS, LLC,**

**Defendant.**

**PLAINTIFFS' OBJECTION TO REPORT AND RECOMMENDATION**

Plaintiffs, Tony Epps and Matthew Sullivan, for themselves and on behalf of all others similarly situated (collectively "Plaintiffs"), by counsel, pursuant to Federal Rule of Civil Procedure 72(b)(2), hereby object to the Magistrate Judge's Report and Recommendation issued April 2, 2019 (ECF No. 91).

The Report and Recommendation announced the Magistrate's recommendations as to the disposition of pending motions for decertification, partial summary judgment, and dismissal. Citing a lack of sufficient evidence in the record, the Magistrate recommended the Court grant Defendant's Motion for Partial Summary Judgment (ECF No. 56) as to Count II of Plaintiffs' First Amended Complaint. (ECF No. 91, pp. 17-28).

Plaintiffs object to the Magistrate's recommendation that the Court grant summary judgment on Count II of the First Amended Complaint. In support of their objection, Plaintiffs hereby incorporate their arguments regarding the sufficiency of their oral contract claim in

Plaintiffs’ Reply to Defendant’s Memorandum in Opposition to Plaintiffs’ Motion for Leave to File First Amended Complaint (ECF No. 48, pp. 7-12), Plaintiffs’ Memorandum in Opposition to Defendant’s Motion for Decertification and/or Partial Summary Judgment (ECF No. 71, pp. 15-19), and Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss Count II of the First Amended Complaint and Plaintiffs’ Claim of a Willful Violation of the FLSA (ECF No. 81, pp. 4-11).

In summary, those arguments are as follows:

- Under Virginia law, an employment relationship is a contractual relationship—if two parties are employer and employee, a contract necessarily exists between them.<sup>1</sup>
- Plaintiffs assert that they each had an oral contract with Defendant, the terms of which are nearly axiomatic, that Plaintiffs would be paid their hourly rate for the hours they worked, with “work” being defined by the plain English meaning of that word.
- What is truly at issue in Plaintiffs’ oral contract claim is not the legal question of whether Plaintiffs had an oral contract with Defendant to be paid for their work—Plaintiffs submit that they certainly did—the issue in dispute is what work Plaintiffs performed particularly at the beginning and at the end of each workday. Plaintiffs submit that this is the fundamental issue for trial and should not be resolved on summary judgment.

Plaintiffs do not object to the remainder of the conclusions in the Report and Recommendation.

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<sup>1</sup> *Phillips v. BJ's Wholesale Club, Inc.*, 77 Va. Cir. 129, 132, 2008 Va. Cir. LEXIS 230, \*\*5-6 (Sept. 26, 2008) (“[t]he relation of employer and employee can only exist by virtue of a contract, express or implied”) (citing *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 97, 135 S.E. 890, 892 (Va. 1926)).

Respectfully submitted,

**TONY EPPS and  
MATTHEW SULLIVAN,  
For themselves and on behalf  
of all others similarly situated,**

By: /s/ Joshua M. David  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of April, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel of record:

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/s/ Joshua M. David